

VIRGINIA:

FILED
CRIMINAL

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY 03 AUG 13 PM 3: 56

COMMONWEALTH OF VIRGINIA,

JOHN D. TREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

**MOTION TO SEAL MENTAL HEALTH REPORTS
FROM COMMONWEALTH REVIEW PRIOR TO ANY
CONVICTION OF A CAPITAL OFFENSE**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and states as follows:

1. The Commonwealth made an oral motion on July 24, 2003 requesting early notice pursuant to Virginia Code Section 19.2-264.3:1(E) of the defendant's intention to present mental health testimony in a penalty phase should it be reached at trial.
2. The Court granted the motion and has required the defense to give notice sixty days prior to trial if mental health testimony is potentially to be offered in mitigation at penalty phase.
3. Virginia Code Section 19.2-264.3:1(G) provides in pertinent part:

“No statement or disclosure by the defendant made during a ...capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in §19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.”
4. Both the last sentence of the statute and the Fifth Amendment [See United States v. Beckford, 962 F. Supp. 748, 764 (ED VA 1997)] preclude the use at the merits phase of a capital

trial of the defendant's statements and information gained by the Commonwealth's mental health expert.

5. Even then, it may be used only to rebut mental health testimony if any is offered by the defense in mitigation. See Estelle v. Smith, 451 U.S. 454, 68 L.ED.2d 359, 101 S.Ct. 1866 (1981), and the last sentence of section G of the statute.

6. The defense's capital mental health evaluation report is to be turned over to the Commonwealth's expert at the time of Notice pursuant to Virginia Code Section 19.2-264.3:1(D).

7. Release of either the defendant's expert's report or the Commonwealth's expert's report to the Commonwealth's Attorneys prior to a verdict of guilty of a capital offense is unnecessary and "[d]elaying access also forecloses the risk that the defendant's right against self-incrimination will be abridged by the State's inadvertent or intentional introduction of the examination results or its fruits for purposes other than impeachment or rebuttal of expert mitigation evidence of mental health condition introduced by the defense." State v. Reid, 981 S.W.2d 166 (Tenn. 1998) citing United States v. Hall, 152 F.3d 381, 398 (5th Cir. 1998).

8. Delaying access to the reports advances the interest of judicial economy by avoiding litigation as to whether particular pieces of evidence the Commonwealth seeks to introduce at the merits phase or prior to defense mitigation evidence were derived from the mental health reports.

9. There are no compelling reasons why the Commonwealth should be entitled to the results of such examinations prior to the time their use becomes relevant.

10. Any procedure (including that proposed by Virginia Code Section 19.2-264.2:1(D) and (G)) which would provide the prosecution access to either evaluating expert's report would be violative of the defendant's Fifth Amendment right to not self-incriminate, Sixth Amendment

right to effective assistance of counsel, and his rights under the Constitution of Virginia, Article I, Sections 8 and 11.

11. Courts in a number of jurisdictions have ruled that delayed access is appropriate and constitutionally mandated. Most recently the Georgia Supreme Court upheld a trial court's determination to seal the results of the prosecution's mental health evaluation until a determination of guilt had been made. State v. Johnson, 276 Ga. 78, 576 S.E.2d 831 (2003).

12. The following jurisdictions have also reached similar conclusions:

Commonwealth v. Sartin, 561 Pa. 522, 751 A.2d 1140, 1143-1144 (Pa. 2000) (results of State's mental health expert's examination of defendant until guilt/innocence phase concluded and defendant announces he will call his expert in the sentencing phase); State v. Reid, 981 S.W.2d 166, 173 (Tn. 1998) (results of State's mental health expert's examination of defendant sealed from prosecutors until the conclusion of the guilt/innocence phase and defendant confirms his intent to call his expert in the sentencing phase); Lagrone v. State, 942 S.W.2d 602, 610-613 (Tex. Cr. App. 1997) (report of evaluation by State's expert sealed until defendant's expert testifies) Many federal district courts also have ordered the results of the government's mental health examination of the defendant sealed until the completion of the guilt/innocence phase and the defendant's announcement that his expert will be called in the sentencing phase. See U.S. Minerd, 197 F. Supp. 2d 272 (W.D. Pa 2002); U.S. v. Edelin 134 F. Supp. 2d 45, 55-56 (D.D.C. 2001); U.S. v. Beckford, 962 F. Supp. 748, 761 (E.D. Va. 1997); U.S. v. Haworth, 942 F. Supp. 1406, 1408-1409 (D.N.M. 1996); U.S. v. Vest, 905 F. Supp. 651, 654 (W.D. Mo. 1995).

13. As noted in many of these cases, there has to be a balancing of the defendant's Fifth and Sixth Amendment protections against the prosecution's right of rebuttal. The Supreme Court of Tennessee addressed the issues raised herein in State v. Reid, 981 S.W.2d 166 (Tenn. 1998):

As a final issue, we must set forth a procedural framework which both accommodates the State's right of rebuttal and safeguards a capital defendant's constitutional right against self-incrimination.....

The State contends that it should be given access to the results of any independent psychiatric examination prior to trial. In our view, there are valid justifications for providing the State access to the report only after the jury has

returned a verdict of guilty and a capital defendant confirms his or her intent to offer expert mitigation evidence relating to mental condition at the sentencing hearing. First, delaying access to the report advances interests of judicial economy by avoiding litigation as to whether particular pieces of evidence the State seeks to admit prior to the defense offering psychiatric evidence were derived from the State's psychiatric evaluation. Delaying access also forecloses the risk that the defendant's right against self-incrimination will be abridged by the State's inadvertent or intentional introduction of the examination results or its fruits for purposes other than impeachment or rebuttal of expert mitigation evidence of mental condition introduced by the defense. Hall, 152 F.3d at 399.

On the other hand, these same concerns do not apply to the defense. In fact, providing the defense with access to any expert reports prior to trial would serve interests of judicial economy. For example, the defense will have sufficient time to review the reports, make an informed decision as to whether to introduce expert mental condition mitigation proof, and be prepared at the conclusion of the guilt phase of the trial to either confirm or withdraw the previously filed notice. If the defense confirms its previously filed notice, the State will then be given the reports and should have sufficient time to study the reports and prepare its rebuttal proof.

We therefore modify the decision of the Court of Criminal Appeals insofar as it foreclosed both the State and the defense from having access to expert reports until the jury has returned a verdict of guilty. We hold that the defense is entitled to have access to any expert reports prior to trial. The State will be afforded access to the report only after a jury returns a verdict of guilty and the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation. In our view, this procedure both protects the State's right of rebuttal and safeguards the defendant's right against self-incrimination. *Id.* at 173.

14. In addition, it has been held that the "Court-appointed mental health professional conducting the examination for the Government shall not discuss his examination with anyone unless and until the results of the examination are released to counsel for the Government and counsel for the defendant following the guilt phase of the trial "United States v. Beckford, 962 F. Supp. 748, 764 (E.D. Va. 1997)

WHEREFORE the defendant, Lee Malvo, by counsel, respectfully moves this honorable Court to enter an Order (contingent upon the defendant giving notice pursuant to Virginia Code Section 19.2-264.3:1(E)) providing that:

1. The reports of the Commonwealth's and defense's mental health evaluations be sealed to the Commonwealth until such time as there is a verdict of guilt as to a capital offense; and

2. The Commonwealth's mental health expert conducting the evaluation be directed to not discuss his examination, findings, or conclusions with any prosecution team member prior to the release of the expert's report following the merits phase, or to convey any such information directly or indirectly.

3. That the report of the Commonwealth's expert conducting the capital mental health evaluation be provided to the defendant prior to the beginning of the merits phase of trial.

Respectfully submitted,

LEE BOYD MALVO

By__

Co-Counsel

and

By__

Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, VA 22151
703-323-1200
703-978-1040 (Fax)
VSB No: 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947(Fax)
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed,
first class mail to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 13th day of August, 2003.

Co-Counsel

Co-Counsel